such certificate must be limited to interstate commerce.

The three-judge district court determined that appellants' complaint should be dismissed because the Commission had jurisdiction to authorize abandonment by the North Shore of its entire line of railroad, both as to interstate and intrastate commerce, and that the evidence justified the Commission's issuance of such an abandonment certificate.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants have not challenged in this appeal the Commission's determination that a certificate permitting abandonment should be issued because present revenues have not been, and future revenues will not be, sufficient to cover the cost of the North Shore's continued operation with sufficient maintenance of facilities necessary to safety of operation. The district court noted that it would be hard to see how a contrary contention could very well be made for the "outstanding single fact supporting this conclusion" is that the North Shore for a thirty-year period from 1932-1961, except for the World War II years, has sustained large operating losses. (J.S. xvi-xvii).[3]

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[3] The North Shore sustained the following operating deficits during the years 1955 to 1961. (J.S. xvii):

"Year	Operating deficit
1955	$661,874
1956	515,067
1957	603,413
1958	462,615

1. The district court and the Commission were clearly correct in determining that the North Shore did not fall within the exemption of Section 1(22) as an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation. Appellants contend that the decision in *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U.S. 1 (1933) is controlling as to the status of the North Shore railroad today. The Commission correctly found that this decision was not controlling because the evidence of record in the present proceeding indicated that the present day status-determining characteristics of the North Shore railroad are not those of an exempt railway within the meaning of Section 1(22).[4]

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[3] (Cont'd)

Year	Operating deficit
1959	398,835
1960	468,239
Ended May 31, 1961	539,872"

[4] Thus, the Commission stated:

"In disposing of a similar contention that applicant is an electric interurban railway not operated as a part of a general railroad system of transportation, our interim report of May 4, 1960, 312 I.C.C. 99, referred to our earlier decision in *Chicago, N. S. & M. Ry. Abandonment*, 290 I.C.C. 765, wherein the same question was presented. * * *

The physical characteristics of applicant remain essentially unchanged since our decision in *Chicago, N. S. & M. Ry. Abandonment, supra.* It continues to engage in the transportation of both passengers and property across the Wisconsin-Illinois State line. While it is principally a passenger carrier, we found in the cited decision (p. 769) that freight accounted for approximately 16.5 percent of its total operating revenues in 1953. The record herein discloses that in 1960 freight traffic accounted for about 14.6 percent of its

As the district court pointed out, the determination of whether the North Shore falls within the exception contained in Section 1(22) involves only the question of whether the facts have been properly interpreted and whether they support the Commission's conclusions (J.S. xiii). Noting that appellants do not dispute the underlying facts as found by the Commission, the district court concluded that the Commission, "has upon an abundance of evidence correctly determined that the North Shore does not fall within the exception and is therefore subject to Section 1(18) of the Act." (J.S. xiii).[5]

Appellants' reliance on this court's decision in *United States* v. *Chicago N. S. & M. Railroad*, 288

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* (Cont'd)

total revenues. Practically all of the freight handled is interchanged with other railroads. Applicant's line is physically connected at six different points with one or more interstate carriers, namely the Elgin, Joliet & Eastern Railway, the Chicago, Milwaukee, St. Paul and Pacific Railway, the Minneapolis, St. Paul and Sault Ste. Marie Railroad, and the Chicago and North Western Railroad, and it continues to participate in more than 1,000 tariffs with class I trunk line carriers. We need not elaborate further. Other status-determining characteristics of applicant detailed in our decision cited above continue to be present. * * *" (J.S. xix-xx).

[5] The district court, after quoting and discussing *United States* v. *Idaho*, 298 U.S. 105 (1936), and *City of Yonkers* v. *United States*, 320 U.S. 685 (1943), concluded that the scope of judicial review as to this question is settled: "although this Court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized." (J.S. xii). Appellants do not challenge the district court's statement of the scope of judicial review (Cf. J.S. 15).

U.S. 1 (1933) is misplaced. That decision does not constitute an authoritative holding that the North Shore is an electric interurban railway, but rather rests on equitable grounds which required a holding that the North Shore was exempt from the provisions of Section 20a of the Interstate Commerce Act. Section 20a contains a similarly worded proviso exempting interurban electric railways from Commission jurisdiction over the issuance of securities. The court reviewed the physical characteristics of the North Shore, and also noted the consistent administrative construction of the North Shore as an interurban electric railway under Section 20a by the Commission for the preceding 10 years. The court stated that although "the proper classification of the railway is not free from doubt" (288 U.S. 1, 13), it would decline to uphold an administrative construction contrary to one which had been relied upon by the company and its officers in issuing securities of which over $38 million were then outstanding.

In *Sprague* v. *Woll*, 122 F. 2d 128 (C.A. 7, 1941), cert. denied, 314 U.S. 669, the Court of Appeals, in affirming a Commission holding that the North Shore was not an exempt interurban electric railway under the Railway Labor Act, and Railroad Retirement Act of 1937, distinguished the 1933 decision of this court in the *North Shore* case pointing out (122 F. 2d at page 131):

> * * * It appears obvious from a reading of that decision that the Court, while entertaining serious doubts of the correctness of the determination if presented as a matter of first impression,

> was moved by equitable considerations to resolve that doubt in favor of the lower court decision under the facts presented. * * *

This Court has called attention to the fact that the same phraseology exempting electric interurban railways is used in other sections of the Act, as well as Section 1(22), but it is so used with other purposes in view. *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 312 (1932). ". . . a determination under one statute need not necessarily be res judicata when the same question arises under identical words of another statute." Davis, *Administrative Law*, Vol. 2, ¶ 18.04, pp. 576-578 (citing the *North Shore* cases as an example).

The decision cited by appellants, *In re Chicago, N. S. & M. R.*, 131 F. 2d 458 (C.A. 7, 1942), cert. denied, 318 U.S. 768, as the district court determined, interpreted Section 77 of the Bankruptcy Act, which differs materially from the Interstate Commerce Act in both its underlying purpose and in its jurisdictional tests. (J.S. ix).

As the district court pointed out, it is apparent from the decisions following *United States* v. *Chicago, N. S. & M. R. Co.*, 288 U.S. 1 (1933), that exemptions similar to Section 1(22), which are found in other provisions of the Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case. (J.S. ix).

2. The district court and the Commission were clearly correct in determining that the Commission's authority was not limited to the grant of a certificate

to abandon operations in interstate commerce. Appellants' contention that the Commission's authority does not extend to intrastate commerce rests upon the unsupported assumption that the North Shore's operations within the states of Wisconsin and Illinois can be segmented from its interstate operations. The Commission found that the North Shore's intrastate and interstate operations are co-mingled and are being conducted as part of the same service. (J.S. xxiii). The district court noted its agreement with the Commission's "well supported findings that the systemwide operations of the North Shore are not capable of a practical disjunction . . .". (J.S. xiv).

Where a railroad crosses a state line and carries both intrastate and interstate commerce over the same tracks in an integrated system of operations so that "[T]he two services are inextricably intertwined," the Commission has exclusive jurisdiction over the operations of the railroad in both interstate and intrastate commerce. *Colorado* v. *United States*, 271 U.S. 153, 164 (1926). Cf. *Texas* v. *Eastern Texas Railroad Co.*, 258 U.S. 204 (1922).

The commerce power is not confined in its exercise to interstate commerce; it extends to those intrastate activities which affect interstate commerce in a substantial way so that regulation of them is appropriate to the power of Congress over interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Transit Commission* v. *United States*, 284 U.S. 360 (1932).

The Commission found that there would be a burden upon interstate commerce even if the North Shore were permitted to operate solely in intrastate commerce because of the obviously insufficient revenues to permit continued safe operations, and the effect upon passenger patronage of the Chicago & North Western Railway Company and of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, whose lines closely parallel those of the North Shore.[6] (J.S. xxiii-xxvi). The district court concluded that these findings were supported by the evidence. (J.S. xiv).

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[6] The North Western's tracks are located slightly west of and generally parallel to the main line of the North Shore. The Milwaukee's line is located slightly east of the North Shore's line, parallels it in part, and is separated by distances ranging from 0.25 mile to 2.4 miles. (J.S. xxiv). (These three lines are pictured on the fold-out map between J.S. 8 and J.S. 9).

The Commission found that the North Western had spent considerable sums for new cars and advertising to increase the patronage on its Milwaukee-Chicago trains, but that it sustained deficits amounting to approximately $2 million on these operations in 1958-1959. (J.S. xxiv). The North Western has announced that discontinuance of the North Shore operations has brought a substantial number of new riders, and that the North Western plans to immediately purchase 10 additional bi-level coaches for suburban service in the Chicago area, at a cost of approximately $1.6 million. *Traffic World*, Vol. 113, No. 7, February 16, 1963, page 30.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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